Financial Services Commission
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Dear Sirs and Madams,

Draft Bill for Introduction of Regulatory Framework for Financial Benchmarks

The International Swaps and Derivatives Association, Inc. ("**ISDA**")[1] and the Asia Securities Industry & Financial Markets Association ("**ASIFMA**"[2], and together with ISDA, the "**Associations**" or "**we**") welcome the opportunity to provide comments on the Draft Bill for Introduction of Regulatory Framework for Financial Benchmarks (the "**Draft Bill**") proposed by the Financial Services Commission ("**FSC**") on 18 June 2018. Terms not defined herein have the same meanings given to them in the Draft Bill.

While our members have sought to form a consensus on the Draft Bill, there are certain issues on which individual members may have their own views. This response represents the majority view of the industry on the issues covered by the Draft Bill, and certain members may provide their comments to the FSC independently.

The Associations strongly support the introduction of a regulatory framework for financial benchmarks in the Republic of Korea and consider this as an important step forward for enhancing robustness and reliance of financial benchmarks and adopting the Principles for Financial Benchmarks issued by the Board of the International Organizations of Securities Commissions in July 2013 ("**IOSCO Principles**"). We would welcome further discussions with the FSC as it finalizes the Draft Bill and proposes further requirements and guidance in relation to financial benchmarks.

We set out our comments in the following by reference to the Articles of the Draft Bill.

[1] Since 1985, ISDA has worked to make the global derivatives markets safer and more efficient. Today, ISDA has more than 900 member institutions from 68 countries. These members comprise a broad range of derivatives market participants, including corporations, investment managers, government and supranational entities, insurance companies, energy and commodities firms, and international and regional banks. In addition to market participants, members also include key components of the derivatives market infrastructure, such as exchanges, intermediaries, clearing houses and repositories, as well as law firms, accounting firms and other service providers. Information about ISDA and its activities is available on the Association's website: www.isda.org. Follow us on Twitter @ISDA.

[2] ASIFMA is an independent, regional trade association with over 80 member firms comprising a diverse range of leading financial institutions from both the buy and sell side, including banks, asset managers, law firms and market infrastructure service providers. Through the GFMA alliance with SIFMA in the United States and AFME in Europe, ASIFMA also provides insights on global best practices and standards to benefit the region.

Article 2 (Definitions)

We request that Article 2 of the Draft Bill clearly defines the following:

- In regards to "User" defined by Article 2(6),
  - the definition of user as defined by usage in Article 2(1)(A) would only cover entities that are financial companies as defined under Article 2(7) and thus would only cover those that are subject to inspection by the Financial Supervisory Service;
  - the definition of user as defined by usage in Article 2(1)(A) would only cover a party to a financial transaction or a financial instrument, and would not capture an entity that brokers such transaction or instrument;
- the definition of "financial instrument" (currently undefined);
- the definition of "financial transaction" (currently undefined);
- the definition of "financial agreement" (currently undefined).

We also propose that the FSC creates a new definition of "use", instead of defining it within the definitions of financial transaction benchmarks under Article 2(1).

Article 3 (Applicable Scope)

- ***Central counterparties, extraterritoriality***

We propose that, for the avoidance of doubt, the Draft Bill includes an explicit exemption for central counterparties ("**CCP**") that provide reference prices or settlement prices used for CCP risk management purposes and settlement. We note that such prices should not be considered to be benchmarks under, and are exempted from the scope of, the European Benchmarks Regulation[3].

We would also welcome clarification from the FSC on when Article 3(2) would apply.

Article 4 (Designation and Revocation of Significant Benchmarks)

- ***Designation of significant benchmarks***

We propose that:

(1) Korean Won/U.S. Dollar market average rate administered by Seoul Money Brokerage Services, Ltd.,

(2) KRW 3M CD rate administered by the Korea Financial Investment Association,

[3] See Recital 19 and Article 2(2)(c) of the Regulation (EU) 2016/1011 of the European Parliament and of the Council of 8 June 2016 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds and amending Directives 2008/48/EC and 2014/17/EU and Regulation (EU) No 596/2014 ("**European Benchmarks Regulation**").

(3) COFIX administered by Korea Federation of Banks,

(4) KOSPI 200 administered by Korea Exchange, and

(5) Hankyung-KIS-Reuter Bond Index administered by KIS Pricing

be designated as a significant benchmark. Such rates are heavily used in the European Union and its designation as a significant benchmark would ensure that its use can be continued in the European Union after 31 December 2019 should an equivalence decision on the Korean regulatory framework for financial benchmarks is adopted by the European Commission. Due to this impact of the European Benchmarks Regulation we request that the FSC sufficiently consults the industry on the list of financial transaction benchmarks that requires designation.

We note that upon designation of significant benchmarks, users of significant benchmarks are subject to obligations (e.g. Article 8) that would require establishment of legal or operational systems. Given the obligations on such users and the time required to establish such systems, we submit that sufficient notice (e.g. at least 6 months) should be given to such users or, if possible, the FSC should consult the public prior to making any designation under Article 4(4). Alternatively, we would welcome that the FSC considers providing for a transitional period to users of significant benchmarks, similar to that provided to administrators under Article 2 of the Addenda.

Article 5 (Registration of Significant Benchmark Administrator)

- ***Operational rules and benchmark explanation document of significant benchmark administrators***

We note that significant benchmark users are required by Article 8(1) of the Draft Bill to provide and explain to their counterparty the benchmark explanation document in Article 5(2)(1). In order to ensure that the benchmark explanation document provides the key information needed for users as well as counterparties of the users, we request that the FSC prescribes further requirements on the detailed contents of the benchmark explanation document under the Draft Bill or that Article 5(7) of the Draft Bill provides for the Presidential Decree to prescribe the same[4].

We also urge the FSC to take into account and follow the IOSCO Principles when prescribing the detailed requirements of the operational rules under the Presidential Decree.

- ***Rules applicable to significant benchmark contributors***

We note that the Draft Bill may also capture financial transaction benchmarks that are calculated from input data that is based entirely on and comes directly from market data of a regulated market. We submit that such financial transaction benchmarks should not be subject

[4] See Article 27 of the European Benchmarks Regulation and the draft regulatory technical standards specifying further the contents of, and cases where updates are required to, the benchmark statement to be published by the administrator of a benchmark, adopted by the European Commission on 13 July 2018 (http://ec.europa.eu/transparency/regdoc/rep/3/2018/EN/C-2018-4439-F1-EN-MAIN-PART-1.PDF).

to certain requirements under the Draft Bill[5]. Calculation of such financial transaction benchmark would not involve any survey or "submission duties" from contributors, therefore the requirement under Article 5(4) of the Draft Bill for significant benchmark administrators to execute and maintain agreements with significant benchmark contributors should not be applicable. Also, the requirement under Article 5(2)(ii) of the Draft Bill to establish operational rules on standard and procedures for significant benchmark contributors should not apply. Even if such provisions on operational rules do not apply, there will be no gap in regulation as participants in such regulated markets are already subject to conduct requirements and regulations against market manipulation[6].

We also note that Article 5(3) of the Draft Bill provides certain conditions where the FSC may ease or exempt application of certain requirements under the operational rules. We urge the FSC to provide in the Draft Bill that significant benchmarks that are calculated from input data that is based entirely on and comes directly from a regulated market should be included as one of the points under Article 5(3) and should be exempted from obligations under Article 5(4) and 5(2)(ii) of the Draft Bill.

Article 6 (Suspension and Discontinuation of Calculation and Submission Duties)

- ***Measures applicable upon suspension or discontinuation of submission duties***

We propose that the orders made pursuant to Article 6(3) should be limited to contributors that already perform submission duties. Under this approach, the Draft Bill would enable the FSC to only require existing contributors to continue to perform their duties and would not compel entities that are not yet contributors to contribute input data. We note that this approach has been adopted in Australia[7].

We note, however, that, under the European Benchmarks Regulation, the competent authorities have the power to compel supervised entities that are not yet contributors to contribute input data under certain circumstances, e.g. where the representativeness of the relevant benchmark is considered to be at risk and the mandatory contribution period is limited[8]. We further note that such mandatory contribution requirements only apply to selected supervised entities, taking into account the size of such entities' actual and potential participation in the market that the relevant benchmark intends to measure[9]. Similarly, under the Singaporean benchmark regime, the Monetary Authority of Singapore has the power to designate certain classes of persons as benchmark submitters and in making such designation, it must have regard to certain

[5] See Article 17 of the European Benchmarks Regulation.

[6] For example, Article 176 and Article 178, 178-2 of the Financial Investment Services and Capital Markets Acts and Article 10 of the Foreign Exchange Transactions Act

[7] See the mandatory contribution requirements under Chapter 3 of ASIC Financial Benchmark (Compelled) Rules 2018 (https://www.legislation.gov.au/Details/F2018L00723/Html/Text#_Toc512326228) and the definition of "Contributors" under Part 1.2.1 of the ASIC Financial Benchmark (Administration) Rules 2018 (https://www.legislation.gov.au/Details/F2018L00728).

[8] See Article 23(6) of the European Benchmarks Regulation.

[9] See Article 23(7) of the European Benchmarks Regulation.

factors[10]. Accordingly, if the FSC adopts the approach of the European Union or Singapore, we suggest that the FSC prescribes appropriate limits and criteria on the exercise of its power to compel mandatory contribution by financial companies under Article 6(3) or provide for a Presidential Decree to prescribe such limits and criteria. We also request the FSC to provide sufficient time for financial companies that are not yet contributors to implement their mandatory contribution obligations. This is because financial companies need time to set up internal controls, obtain internal approvals and establish systems to ensure compliance with the relevant code of conduct and governance framework for the significant benchmark.

Article 7 (Obligations of Administrator)

- ***Administrators' obligation to collect related parties' opinions upon suspension or discontinuation***

We note that, pursuant to Article 7(4), an administrator is required to consult related parties prior to submitting to the FSC a report relating to its intention to suspend or discontinue its calculation duties under Article 6(1). Similar to Article 6(1), we suggest that the Draft Bill provides that such prior consultation requirement could be waived for "unavoidable grounds".

Article 8 (Usage of Significant Benchmarks)

- ***Obligation to provide and explain benchmark explanation document***

We understand that the FSC's legislative intent is for Article 8 to only apply to users when they enter into financial transactions with counterparties that are financial consumers. We are supportive that the obligation prescribed by Article 8(1) should only apply to transactions with financial consumers. In relation to this, we propose that Article 8(1) of the Draft Bill clearly limits the scope of "counterparty of financial transactions" to "financial consumers" only. In defining "financial consumers", we strongly urge the FSC to exclude "professional investors" as defined under Article 9(5) of the Financial Investment Services and Capital Markets Act ("**FSCMA**") from the scope of counterparties subject to this requirement. Under the FSCMA, a financial investment business entity is not required to explain the details of the financial investment instrument to "professional investors"[11], and we submit that the scope of counterparties subject to the obligation under Article 8(1) of the Draft Bill should be aligned with that of the FSCMA. We further suggest that the FSC clarifies that Article 8(1) would not apply to financial transactions that significant benchmark users enter into with other financial companies. We also submit that intragroup or inter-affiliate transactions (including transactions with foreign entities and transactions between head offices and branches) of financial companies should be excluded from this obligation.

Please also see our comments on Article 2 requesting clarity of various definitions.

[10] See section 123ZI of the Securities and Futures Act of Singapore, as amended by section 47 of the Securities and Futures (Amendment) Act 2017 (https://sso.agc.gov.sg/Acts-Supp/4-2017/Published/20170216?DocDate=20170216#legis).

[11] See Article 47 of the FSCMA

- ***Obligation to establish contingency plans***

We submit that the contingency plan required to be made under Article 8(2) should serve the purpose of providing clarity on the actions that users would take and enhancing contractual robustness in the event that a benchmark ceases to be provided, and not for protection of their counterparties to the financial transactions. Further, counterparties who are financial consumers already enjoy certain consumer protection under other laws, e.g. the Act on the Regulation of Terms and Conditions and provisions for damages under the Korean Civil Act. Accordingly, we submit that the FSC should delete the reference to "protecting the counterparty of financial transactions" under Article 8(2).

We also note that Article 8(2) prescribes that significant benchmark users should establish contingency plans "in the case there will be no calculation of significant benchmarks". We request the Draft Bill to clearly state that significant benchmark users should only establish contingency plans for "suspension and discontinuation of calculation duties", and such plans would not be required to address temporary disruptions. We would like to highlight the ongoing industry work pursuant to Article 28(2) of the European Benchmarks Regulation to establish contractual arrangements to identify alternative fallbacks. We would welcome clarification from the FSC on the contents and level of detail that the contingency plan prescribed in Article 8(2) of the Draft Bill should contain.

Penalty (Article 15)

We note that, under Article 15(2), users that fail to store and maintain materials under Article 7(5) may be imprisoned for no more than one year or fined for no more than KRW 10 million. We submit that the penalty of imprisonment is disproportionate to the gravity of breach of record-keeping requirements and propose that only monetary fines should be imposed.

Timeline

We note that many of the specific requirements under the Draft Bill will be prescribed by the Presidential Decree. Our members would appreciate that these subordinate rules be communicated to the public as soon as possible so that members can get ready to comply with the requirements.

We look forward to continuing our dialogue with you. Please do not hesitate to contact Keith Noyes, Regional Director, Asia Pacific, ISDA at (knoyes@isda.org, at +852 2200 5909) or Hyelin Han, Assistant Director, ISDA (hhan@isda.org, at +852 2200 5903) if you have any questions.

Yours faithfully,

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